

Federal Tax Court increases legal certainty for non-quota capital reserves!

Shareholders sometimes pay into capital reserves on a non-quota basis, measured against their regular shareholding ratio. This phenomenon is often found in connection with employee participation programs and financing rounds. While investors usually have considerable financial resources, this is often not the case for managers or founders. Investors therefore pay the nominal amount of the shares and make additional substantial payments into the capital reserve. Managers, on the other hand, only pay the nominal amount of the shares. In return, investors receive a liquidation preference. This stipulates that the capital reserve is solely attributable to the investors and that they are entitled to priority repayment of this amount. In addition, the capital reserve usually bears economic interest, i.e., in addition to the priority capital repayment, any income is also paid to the investors in a predetermined amount. This serves as compensation for their early capital service and the default risk they have assumed. Alternatively, there are also models with personal capital reserves.

A non-proportional payment into the capital reserve could constitute a so-called fictitious gift within the meaning of section 7 (8) sentence 1 Gift and Inheritance Act (GITA). This provision was created to close tax loopholes where only one shareholder pays funds into the capital reserve of a corporation and effectively enriches his co-shareholders. This is because a direct payment to the shareholders would be classified as a gift within the meaning of section 7 (1) No. 1 of the GITA, whereas a payment to the corporation would not. This loophole is intended to be closed by the special provision in section 7 (8) GITA – with the risk of an excessive effect when applying the law in practice.

In the opinion of the Federal Tax Court, a disproportionate contribution by a shareholder to the capital reserve of his corporation is in principle capable of leading to a taxable increase in value within the meaning of section 7 (8) sentence 1 GITA. This is appropriate because such a contribution also increases the value of the shares of the non-contributing shareholders on a pro rata basis. However, such an increase in the value of the shares of the co-shareholders within the meaning of section 7 (8) sentence 1 GITA does not occur if the contributing shareholder is granted additional rights in connection with his contribution, such as an improvement in his share of profits, additional shares in the company or a distribution of assets that differs from the distribution of shares in the event of subsequent liquidation.

Admittedly, the Federal Tax Court's decision is only a decision to suspend enforcement. The Federal Tax Court therefore did not have to make a final decision, but merely expressed serious doubts about the tax office's opinion. Nevertheless, the Federal Tax Court's decision is likely to increase legal certainty both for non-proportional capital reserves with liquidation preference and for personal capital reserves. It is to be expected that the Federal Tax Court will decide in the same way in the main proceedings, even if this cannot be predetermined with absolute certainty.

The full decision can be found as Federal Tax Court decision of June 6, 2025 – II B 43/24 (AdV)